

**Date: 20080404**

**Docket: A-100-07**

**Citation: 2008 FCA 126**

**CORAM: DESJARDINS J.A.  
NOËL J.A.  
TRUDEL J.A.**

**BETWEEN:**

**BAND COUNCIL OF THE ABENAKIS OF ODANAK  
in its capacity as Council of the band of the Abenakis of Odanak**

**Appellant**

**and**

**THE HONOURABLE ANDY SCOTT  
in his capacity as Minister of Indian Affairs  
and Northern Development**

**Respondent**

Hearing held at Montréal, Quebec, on March 12, 2008.

Judgment delivered at Ottawa, Ontario, on April 4, 2008.

**REASONS FOR JUDGEMENT BY:**

**DESJARDINS J.A.**

**CONCURRED IN BY:**

**NOËL J.A.  
TRUDEL J.A.**

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**REASONS FOR JUDGMENT**

**DESJARDINS J.A.**

[1] This is an appeal from a decision of a motions judge of the Federal Court (*Band Council of the Abenakis of Odanak v. Canada (Minister of Indian Affairs and Northern Development)*, 2007 FC 30) who dismissed an application for judicial review of a decision of the Minister of Indian Affairs and Northern Development (the Minister or the respondent). Pursuant to subsection 10(7) of

the *Indian Act*, R.S.C. 1985, c. I-5 (the Act), the Minister refused to give notice to the Abenakis of Odanak (Band or Odanak) that it would from now on have control of its own membership.

## STATUTORY PROVISION AT ISSUE

[2] Under the provisions of section 10 of the Act, which was enacted in 1985, a band which wishes to do so may assume the control of its own membership if it establishes membership rules in writing and if it is authorized to do so “by a majority of its electors”. According to the Minister of Indian Affairs and Northern Development, who shepherded the bill to amend the Act through the House of Commons on March 7, 1985, this measure was the beginning of a process for the complete political independence of Indians (House of Commons Debates, March 7, 1985, page 12: 7 see also *Sawridge Band v. Canada*, [2003] 3 C.N.L.R. 344 (F.C.T.D.), paragraphs 28 to 32).

[3] Section 10 of the Act reads as follows:

### **Band control of membership**

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band’s control of its own membership.

### **Membership rules**

(2) A band may, pursuant to the consent of a majority of the electors of the band,  
(a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and  
(b) provide for a mechanism for reviewing decisions on membership.

### **Pouvoir de décision**

10. (1) La bande peut décider de l’appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu’elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.

### **Règles d’appartenance**

(2) La bande peut, avec l’autorisation de la majorité de ses électeurs :  
a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d’appartenance à ses effectifs;  
b) prévoir une procédure de révision des décisions portant sur l’appartenance à ses effectifs.

#### **Exception relating to consent**

(3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

#### **Acquired rights**

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

#### **Idem**

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

#### **Notice to the Minister**

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

#### **Notice to band and copy of Band List**

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

#### **Statut administratif sur l'autorisation requise**

(3) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)p.4), un règlement administratif mettant en vigueur le présent paragraphe à l'égard de la bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des membres de la bande âgés d'au moins dix-huit ans.

#### **Droits acquis**

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

#### **Idem**

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)(c) avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

#### **Avis au ministre**

(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.

#### **Transmission de la liste**

(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies :

(a) give notice to the band that it has control of its own membership; and  
(b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

**Effective date of band's membership rules**

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

**Band to maintain Band List**

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(b), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

**Deletions and additions**

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

**Date of change**

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

[Emphasis added.]

a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;  
b) ordonne au registraire de transmettre à la bande une copie de la liste de bande tenue au ministère.

**Date d'entrée en vigueur des règles d'appartenance**

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.

**Transfert de responsabilité**

(9) À compter de la réception de l'avis prévu à l'alinéa (7)b), la bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de cette date, est déchargé de toute responsabilité à l'égard de cette liste.

**Additions et retranchements**

(10) La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.

**Date du changement**

(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.

[Je souligne.]

## DECISION AT ISSUE

[4] The Minister's decision, dated October 3, 2005, is long and detailed. I must reproduce it in its entirety:

[TRANSLATION]  
Mr. Gilles O'Bomsawin  
Chief of the Band Council of the Abenakis of Odanak  
...  
ODANAK QC JOG 1H0

Sir:

This is in answer to your correspondence dated January 12 and April 7, 2005, to the effect that the Odanak band will assume control over its membership from now on, pursuant to section 10 of the *Indian Act*.

You have advised me that, given that 85 per cent of your electors live off reserve and are dispersed across Canada and the United States, and since the Department of Indian Affairs and Northern Development Canada does not maintain a list of addresses of band electors, it was impossible for you to contact more than 330 of the 1,555 band electors. In spite of these difficulties, you confirmed that you had consulted with a majority of more than 59 per cent of electors for whom either the band or the Department had an address.

As you know, under subsection 10(1) of the Act, the Minister must be certain that a majority of the First Nation electors have authorized the rules of membership determined by the First Nation before it can be given a notice advising it that it may assume control of its own membership. The Act is very clear as to the consent which the majority of electors must give as a condition precedent to the transfer of membership. If, as you have suggested, your electoral base should be artificially reduced by striking out the names of electors whose addresses are not available, your First Nation and the Department might face legal liability for having reduced the electoral base. Application of the Odanak band membership rules could be considered null and void if legal proceedings were undertaken. Such a situation would mean that any person who became a band member under these rules could lose his or her membership. Furthermore, any person refused membership could probably claim the loss of future benefits. Considering this serious risk, I am unable to accept your suggestion to reduce your electoral base, and unfortunately I must advise you that I cannot give you a notice to the effect that the Odanak band may assume control of its membership.

You may be aware of the fact that the Department is presently conducting a study and in case acceptable documentation is received, with the deactivation of certain records in the Indian Registration System. This initiative will allow deactivating the records of persons

aged more than one hundred years and those of several persons deceased or presumed to be deceased. This examination will include the 33 persons aged more than one hundred years who are on the Odanak band list. However, I note that if it is established that these 33 persons are deceased or presumed to be deceased and if their names are withdrawn from your electoral base, you would still not have obtained authorization from the majority.

I would also like to reply to the additional comments that you and the representatives of your first nation made to the Department civil servants at your meeting on April 5, 2004. It was mentioned that it was not the intent of Parliament in drafting and enacting subsection 10(1) to prevent bands from managing their own band lists, even if that is the case since the Supreme Court judgment was rendered in *Corbière*.

In addition, it had been mentioned that if the Department had applied the recommendation made by the Court to balance the rights of members living on reserves and those of members living off reserve by presenting a two-branch approach for voting rights, your First Nation would have obtained by now an authorization of the majority.

According to the information I have obtained, in *Corbière*, the Supreme Court of Canada did not recommend or order a two-branch approach for voting. However, it did consider the possibility that the Department could conduct an investigation to distinguish local stakes (those having an impact only on members who live on reserves) and stakes concerning all members, no matter where they live. One solution would be to adopt a voting right only for voters who are concerned about an issue. For example, because the matter of the garbage collection schedule in a reserve does not concern members who live off reserve, only members who live on the reserve would be entitled to vote. However, membership rules are not strictly of local interest. They obviously have an impact on all First Nation members, whether or not they live on or off reserve. Accordingly, the reasons for which the *Corbière* judgment was rendered did not concern the matter of membership rules.

In addition, at the meeting on April 5, 2004, participants mentioned that the files of the Akwesasne Mohawks and of the Viger band had made precedents because the Minister had exercised discretionary power and did not strictly apply subsection 10(1). The participants at that meeting suggested that the same considerations be taken into account for the Odanak band.

I underline the fact that the Akwesasne Mohawks and the Viger band had obtained what was determined to be a majority on the basis of the information submitted. The situation is quite the contrary for the Odanak band which has not yet obtained such a majority.

In 1987, the Akwesasne Mohawks indicated that they wished to control their membership. As far as membership rules are concerned, of the 1,412 qualified voters,

739 voted, 567 agreed with the membership rules, 167 voted against and 5 ballots were cancelled. The band council advised that approximately 75% of the 673 persons who had not voted represent a portion of band members who respected tradition and who accordingly did not accept the voting procedures specified in the Act. These persons participated in a traditional type of government which includes a decision-making process by consensus during meetings. The band council submitted evidence of an agreement on the membership rules in the form of a statutory declaration and a letter from the secretary of the Mohawk First Nation of Akwesasne. Because the Act does not specify in which way a majority is to be determined, it was believed that there was some room for manoeuvring on this point. This consensus and the 567 favourable votes were more than sufficient to meet the requirement of a majority of 707 votes in compliance with subsection 10(1) of the Act.

In 1987, before the *Corbière* judgment, the Viger band had also adopted measures to control its membership. The band had not yet received authorization to choose its chief and councillors according to traditional customs rather than according to the electoral provisions under the Act. At that time an elector had to be a member of the band, aged 18 years and over, living on reserve and not having lost his right to vote. The fact that no member of the Viger band was living on reserve was a problem because it was impossible to meet the requirements to be a qualified elector under the Act. Therefore, the decision was made to support the transfer of membership on the basis of the authorization of the majority of band members 18 years old and over.

I thank you for the efforts your First Nation has shown by consulting its electorate on this important issue. I sincerely regret that my answer cannot be more favourable. However, I believe that my letter will explain to you why I cannot give you notice to the effect that the Odanak band may decide on its membership.

Sincerely,

The Honourable Andy Scott, PC/MP

c.c. Mr. Paul Dionne

[Emphasis added.]

## **FACT SITUATION**

[5] The facts were explained at length by the motions judge and by the parties in their respective memoranda.

[6] For the purposes of this appeal, it is sufficient to note that it was during 2001 that the band council of the Abenakis of Odanak, a band within the meaning of the Act, had undertaken steps with the Minister to assume control of its membership list. Pursuant to subsections 10(1), (4) and (5) of the Act, the Band adopted, in French and in English versions, the *Code of Citizenship of the Abenakis of Odanak* (April 2, 2003 version). On July 7, 2003, the Department's Director, Indian Registration and Band Lists, deemed this version of the *Code of Citizenship* to be in compliance with the Act.

[7] Because 85% of the band electors resided off reserve, the band council decided to consult its electors by means of a postal vote. The consent process began on May 8, 2003, and continued until December 4, 2004.

[8] According to the appellant, the length of the consent process was due to the following factors:

- (a) The band list supplied by the Minister, which was used as an electoral list, did not contain any addresses and included the names of several deceased persons from whom Odanak had not had any news for more than seven years, as well as voters who were unfit to make decisions or who were simply disinterested.
- (b) The Band itself did not have addresses for more than 21% of the persons on the list.

[9] The Minister's officials advised the Band Council that they did not have any address lists, but the Department's Indian Registration and Band Lists Directorate kept some addresses of

electors who had applied for registration in the Indian Register following the 1985 amendments.

The officials offered to forward voting kits to electors whose addresses were known exclusively to them, which allowed the Band to receive two additional duly completed voting forms.

[10] All the problems caused by the electoral list were the subject of a meeting on April 5, 2004, between the Band Council and the Minister's officials. In order to solve these problems, the Minister's officials suggested reducing the Band's electoral base. To this end, the Minister's officials were willing to take into account persons who were presumed to be dead, unfit, without any known address or indifferent and who were on the electoral list. Ten days later, on April 15, 2004, the official in charge of the file wrote to the Band Council requesting that it provide him with:

- (a) a chronology of steps undertaken to date in connection with the consent process;
- (b) declarations sent to the Department in 1995 or 1996 certifying the death of certain persons who were still on the band list;
- (c) a list of electors for whom the band did not have addresses;
- (d) a list of electors who had openly or implicitly shown their indifference to the consent process.

[11] In answer to this request, the Band Council supplied the following:

- (a) a chronology of steps undertaken in connection with the consent process;
- (b) a list of 33 persons appearing on the electoral list who were presumed to be aged 100 years or older;

(c) a list of 207 persons appearing on the electoral list who had no known address on the Odanak reserve;

(d) a list of 33 electors who did not show any interest in the process, 2 of which had the following notation: “not able to vote due to mental illness or debilitating disease”.

[12] The Band Council sent new declarations certifying the deaths of persons on the electoral list who were presumed to be 100 years or older.

[13] These new declarations were drafted according to instructions from Department officials who specified that a declaration had to be filed for each person presumed to be aged 100 years or older, whereas files concerning persons aged 115 years or older would be automatically deactivated by the Minister’s Registrar within one month.

[14] On September 21, 2004, the Band Council submitted 28 declarations certifying the deaths of 28 electors presumed to be aged 100 years or older, as well as a resolution of the Band Council certifying the deaths of those persons.

[15] On the same day, the Band Council submitted a declaration from counsel for Bernadette Laurent, an Odanak elector aged 101 years old, certifying that she [TRANSLATION] “is not fit to make any decision, can no longer speak and does not recognize anyone” (A.R., vol. I, page 308).

[16] At the same time these steps were being taken, in the summer and fall of 2004, the Band Council tried to have the Minister's officials:

- (a) provide details about possible solutions, as they had promised on April 5, 2004;
- (b) specify the number of electors included in the band's electoral base.

[17] By early November 2004, the Band Council had still not received any answers to these questions.

[18] The Band Council decided to end the consent process but advised the Minister's officials beforehand of its intentions.

[19] On December 4, 2004, at the end of the consent process, 769 (figure submitted by the Minister) or 770 (figure submitted by the Band) Odanak electors had voted in the consent process, and nearly 95% of them had voted in favour the Band's assuming control of its membership.

[20] Because no adjustments had been made to the Band's electoral base, the reference electoral list had 1,555 names at that time.

[21] On January 12, 2005, the Band Council sent the Minister notice that the Band was assuming control of its membership under subsection 10(6) of the Act, explaining that it had determined the electoral base on the basis of the 1,225 electors it managed to contact and adding that

[TRANSLATION] "in spite of several requests on behalf of the person in charge of the consent process

and the Band Council, the Department did not specify the number of electors which in its view should be accepted for the purposes of the consent process” (A.R., vol. III, page 1183).

[22] Subsequently, on January 25, 2005, the Minister’s Registrar wrote to the Band that the files of seven persons named in the declarations sent on September 21, 2004, were “deactivated” in the Indian Register as of the date of this letter because they were presumed to be dead.

[23] On that same day, the Registrar wrote to the Band that the files of three of those persons could not be “deactivated” because of shortcomings in the declarations concerning them which had been submitted on September 21, 2004.

[24] On January 31, 2005, the Registrar advised the Band in writing that the files of another 18 persons could not be “deactivated” because of shortcomings in the declarations.

[25] In a letter dated March 22, 2005, the Registrar wrote to the Band that it was no longer necessary to obtain new declarations for the three persons mentioned in her second letter dated January 20, 2005. Since those persons were more than 115 years of age, she was satisfied that they were presumed dead. She wrote that she would record this event in the Indian Register as of the date of the letter.

[26] In his decision dated October 3, 2005, the Minister did not give any details about the electoral base he had used to verify whether the condition regarding consent had been met. It was

subsequently revealed that this electoral base included 1,545 electors, that is, the 1,555 electors on the original list from which the Minister had subtracted, retroactively to May 8, 2003 (beginning of the consent process), the 10 files deactivated in January and March 2005. The Minister explained that he had taken the initiative of deactivating the files of Odanak electors who were dead or presumed dead.

[27] On January 20, 2006, the Registrar wrote to the Band that she was satisfied that, on the basis of their age (between 110 and 115 years old), six persons whose files she had said could not be deactivated on January 31, 2005, were deceased as of the date of her letter. She also stated in this letter that the details had been recorded in the Indian Register.

[28] Finally, on March 27, 2006, the Registrar wrote to the Band that she was declaring that, on the basis of their age (between 107 and 110 years old), seven other persons whose files she had said could not be deactivated on January 31, 2005, were deceased as of the date of her letter. She also stated in this letter that the details had been recorded in the Indian Register.

#### **APPLICABLE STANDARD OF REVIEW**

[29] The appellant and the respondent submit that the standard of review applicable to the Minister's decision is correctness because the issue at hand essentially concerns the interpretation of section 10 of the Act. I agree (*Dunsmuir v. New Brunswick* 2008 SCC 9, paragraph 60).

## APPELLANT'S CLAIMS

[30] The appellant requests the following:

- (a) that the Minister be obliged to submit to it a deactivated band list;
- (b) that the deactivated band list constitute the electoral base for the consultation;
- (c) that the terms “majority of electors” in section 10 be interpreted in light of the Supreme Court of Canada’s decision in *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, [1982] 1 S.C.R. 508 (*Enoch Band* or *Cardinal*) as meaning “a majority of the majority”. Accordingly, if there are 1,000 electors on the band list, at least 501 must vote, and more than 50% of those voters must be in favour of the proposed measure.

[31] However, the respondent submits that, to be able to decide on its membership under subsection 10(1) of the Act, a band must obtain the positive or favourable vote of 50% of all band electors, plus one. The respondent refers to the concept of an absolute majority.

[32] The respondent does acknowledge having deactivated the band list, a process that the motions judge described at length at paragraphs 14, 15, 16 and 17 of his reasons:

[14] In fact, it is not contested that on the date of the beginning of the consent process undertaken by the Abenakis of Odanak band council, that is to say, May 8, 2003, 1,555 persons of at least 18 years of age were registered on the relevant band list maintained by the Registrar. As at the date of the election in question, that is, October 3, 2005, the number of electors registered on this list had been reduced to 1,545, since the Registrar had struck out the names of seven persons who were deceased as of May 8, 2003, according to statutory declarations submitted by the Odanak local administrator of the Indian Register, and of three additional persons presumed to be dead because they would have been over 115 years of age on May 8, 2003.

[15] Therefore, it appears from the evidence that the electoral base of the Abenakis of Odanak band for the purposes of the consent vote it undertook under section 10 of the Act included 1,555 electors. This electoral base was then reduced to 1,545 electors because before the date of the decision in question, 10 files were struck out from the Indian Register and therefore from the band list used to establish the voters list of the Abenakis of Odanak band. Accordingly, to obtain

the required consent of a majority of band electors under subsection 10(1) of the Act, the Abenakis of Odanak band had to either (a) obtain affirmative votes from 773 electors, if the absolute majority concept advanced by the respondent applies, or (b) have at least 773 electors participate in the vote, with at least 387 of these participants voting in favour, in accordance with the majority-of-the-majority argument submitted by the applicant.

[16] The results of the vote organized by the Abenakis of Odanak band were sent to the Minister after the band had chosen to end the consent process pursuant to subsection 10(6) of the Act. These results showed that no more than 770 (figure submitted by the applicant) and no less than 769 (figure submitted by the respondent) electors had participated in the consent process, of which no more than 731 (figure submitted by the applicant) and no less than 728 (figure submitted by the respondent) had voted in favour of the band's assuming control of its membership.

[17] Therefore, even if we accept the figures of 770 participating electors and 731 electors in favour, as submitted by the applicant, the evidence shows that the majority required under the Act, be it an absolute majority or the majority of the majority, was not obtained. We are at least 42 affirmative votes short of the absolute majority advocated by the respondent, and to obtain the majority of the majority favoured by the applicant, there had to be at least three more participating electors.

## **THE BAND LIST**

[33] Under the *Indian Act*, until an Indian band assumes responsibility for its list pursuant to section 10 of the Act, the Department maintains a band list through the Registrar. In addition, under subsection 4(1) of the *Indian Band Election Regulations*, C.R.C., c. 952, the band list, for the purposes of section 10 of the Act, is used as an electoral list. Finally, since the Supreme Court of Canada's decision in *Corbière v. Canada (Minister of Indian and Northern Affairs Canada)*, [1999] 2 S.C.R. 203, band members who are not ordinarily resident on the reserve have been allowed to maintain their voting rights and be qualified as band "electors" if they meet the other conditions. "Elector" is defined in section 2 of the Act.

### **INTERPRETATION**

#### **Définitions**

2. (1) In this Act,

...

### **DÉFINITIONS**

#### **Définitions**

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

[...]

<p><b>“elector”</b>  «électeur »  “elector” means a person who  (a) is registered on a Band List,  (b) is of the full age of eighteen years, and  (c) is not disqualified from voting at band elections;  . . .</p>	<p>«électeur »  <b>“elector”</b>  «électeur » Personne qui remplit les conditions suivantes :  a) être inscrit sur une liste de bande;  b) avoir dix-huit ans;  c) ne pas avoir perdu son droit de vote aux élections de la bande.  [...]</p>
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[34] The respondent must give this list to any Indian band that intends to avail itself of the provisions of section 10 of the Act. However, this list is not always reliable, given that the changes (births, deaths, etc.) are made further to a request by the person or persons concerned, and that it is not always that person or those persons who make the request. The list is not always useful either, given the changes of address which are not always reported by the persons in question.

[35] The appellant’s claim that the Minister must provide it with a useful and reliable list is self-evident. To be useful and reliable, this list must reflect reality as much as possible.

[36] The task of maintaining a useful and reliable list is not always easy. However, the lesson learned from what the appellant and respondent have gone through in this case is the following: It is pointless to contemplate applying section 10 of the Act without having first established a consistent list of electors. Because it is the Minister’s duty to apply the Act, it is his duty to ensure that it functions properly; otherwise, Parliament’s intent in enacting the 1985 amendment would be to no avail. Moreover, the deactivation process must be undertaken by the Minister before a vote is held. All these measures are part of the administrative process recognized and used by the Minister in this case.

## **IMPACT OF CORBIÈRE**

[37] The respondent submitted that when a band takes control of its membership, it may cancel the guarantee established by *Corbière*, which recognizes that non-resident Indians have a right to vote. I do not consider this statement to be accurate.

[38] Section 10 of the Act protects acquired rights. Among other things, this is a protective measure for Indians covered by the Supreme Court of Canada's decision in *Corbière*. A band must comply with this protective measure even after it has assumed control over its membership. The band remains subject to the Act at all times.

[39] It is obvious that persons who wish to exercise their right to vote as band members but do not live on reserve are responsible for reporting their change of address to the Registrar or to the local administrator of the Indian Register. If it is impossible to contact these persons, the Minister may strike their names from the band list without having to amend the legislation, since these persons do not lose the right to have their names on the list. If they report their correct addresses before the vote takes place, their names may be put back on the list.

## **VOTING – “A MAJORITY OF ELECTORS”**

[40] The respondent argues that section 10 requires applying an absolute majority test, that is, the affirmative vote of the majority of all band electors. I do not agree.

[41] The expression “a majority of the electors of the band” is used in subsections 2(3), 10(1) and (2), sections 13.1 and 13.2 and subsections 39(1) and (2) of the Act. Elsewhere, in sections 74, 85.1 and 120 of the Act, specific terms concerning voting rights are associated with the words “majority of the votes of the electors of the band” or “majority vote of those electors of the band”.

[42] There is no mistake in interpreting the words “majority of the electors” in section 10 of the Act according to the interpretation given by the Supreme Court of Canada in *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, [1982] 1 S.C.R. 508. That case concerned the interpretation to be given to the words “majority . . . of the band . . . at a meeting . . . summoned for that purpose” in section 49 of the *Indian Act*, R.S.C. 1906, c. 81, which dealt with the surrender of all or part of the reserve’s lands. Estey J., writing on behalf of the Supreme Court of Canada, stated the following (paragraph 13 of the reasons):

13 It may be helpful to analogize the first requirement of the majority to that of a prescription of quorum and it may be helpful to refer to the second requirement that the assent be given at a meeting as simply a prescribed mechanical method of determining the will of the meeting on the issue of assent. In adverting to the common law principle, *supra*, I had in mind *The Mayor, Constables, and Company of Merchants of the Staple of England v. The Governor and Company of the Bank of England* (1887), 21 Q.B.D. 160 at p. 165 where it was stated by Wills J. in reference to the acts of a corporation being those of the major part of the corporators corporately assembled:

This means that, in the absence of special custom, the major part must be present at the meeting, and that of that major part there must be a majority in favour of the act or resolution.

In more recent times and to the same effect, see: Gillanders J.A., in *Glass Bottle Blowers’ Association of the United States and Canada v. Dominion Glass Company Limited*, [1943] O.W.N. 652 (Labour Court); and *Itter v. Howe* (1896), 23 O.A.R. 256. To require otherwise, that is to say more than a mere majority of the prescribed quorum of eligible band members present to assent to the proposition, would put an undue power in the hands of those

members who, while eligible, do not trouble themselves to attend, or if in attendance, to vote; or as it was put by Gillanders J.A. in *Glass Bottle Blowers'*, *supra*, at p. 656, it would “give undue effect to the indifference of a small minority”.

[43] In this case, the first majority of electors constitutes the quorum. The decision must then be made by the majority of those who attend the meeting. Otherwise, this would amount to giving the indifference of those who did not attend a significance that it should not have.

[44] It is true that the *Enoch Band* judgment was rendered before *Corbière*. However, this interpretation of the words “majority . . . of the band” in section 10 of the Act is the only one which ensures the application of section 10 while respecting the rights of everyone.

[45] The honour of the Crown requires that it ensure the proper operation of the *Indian Act*. In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, paragraphs 16-19, McLachlin C.J. wrote that the honour of the Crown is always at stake in its dealings with Aboriginal peoples (paragraph 16). The Chief Justice added that this core precept (paragraph 16) also infuses the processes of treaty making and treaty interpretation (paragraph 19). In my view, this core precept extends to the effective application of section 10 of the Act, which the Minister of Indian Affairs and Northern Development stated in 1985 was the beginning of a process aimed at total political autonomy for Indians.

[46] It is interesting to note that, with the enactment of subsections 39(2) and (3) of the Act, in the case of an absolute surrender or a designation of lands, Parliament added to the majority-of-the-

majority vote the possibility of holding a second round of voting which takes into consideration the more flexible rule of “a majority of the electors who did vote” (subsection 39(2)) or “a majority of the electors voting” (subsection 39(3)).

## **CONCLUSION**

[47] The Minister must give his full co-operation in deactivating the band list before a vote is held so that the band list corresponds as much as possible to reality. The Minister must also strike the names of band members who do not live on reserve and who cannot be contacted because they did not give notice of their change of address. Finally, the terms “majority of the band” in section 10 of the Act must be interpreted as meaning “majority of the majority.” This is the only possible interpretation which reflects the requirements in *Corbière* while also ensuring the operation of section 10 of the Act.

[48] I would allow the appeal with costs here and below, set aside the decision of the motions judge, allow the application for judicial review and return the matter to the Minister so that he might deactivate the band list, strike the names of persons living off reserve whose addresses are wrong and who cannot be contacted because they did not give notice of their changes of address, and render another decision in accordance with the principle that the majority required under section 10 is a majority of the majority.

“Alice Desjardins”

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J.A.

“I concur.  
Marc Noël J.A.”

“I concur.  
Johanne Trudel J.A.”

Certified true translation  
Michael Palles

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-100-07

**STYLE OF CAUSE:** BAND COUNCIL OF THE  
ABENAKIS OF ODANAK (in its  
capacity as Council of the band of  
Abenakis of Odanak)  
and  
THE HONOURABLE ANDY SCOTT  
(in his capacity of Minister of Indian  
Affairs and Northern Development)

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** MARCH 12, 2008

**REASONS FOR JUDGMENT BY:** DESJARDINS J.A.

**CONCURRED IN BY:** NOËL J.A.  
TRUDEL J.A.

**DATED:** APRIL 4, 2008

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